FREDERICK TING HUA SAN

v.

BAN GUAN THYE SAWMILL SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: R2-12-73-2002]
19 NOVEMBER 2002

CIVIL PROCEDURE: *Summary judgment - Appeal against - Claim for outstanding sum against appellant as guarantor for 1st defendant pursuant to letter of guarantee - Whether respondent had intention of proceeding to full trial - Whether appellant had raised triable issues - Subordinate Courts Rules 1980, O. 26A*

CIVIL PROCEDURE: *Summary judgment - Affidavit - Affidavit in support of application - Whether respondent fully complied with preliminary requirements - Subordinate Courts Rules 1980, O. 26 r. 2(1), form 75A*

CIVIL PROCEDURE: *Affidavits - Affidavit in support of application - Summary judgment - Whether respondent fully complied with preliminary requirements - Subordinate Courts Rules 1980, O. 26 r. 2(1), form 75A*

CONTRACT: *Guarantee - Demand for payment - Credit terms of letter of guarantee - Whether there was breach of any fundamental condition - Sufficient consideration - Whether appellant liable to pay all outstanding accounts*

CONTRACT: *Guarantee - Interest - Prescribed interest in letter of guarantee - Whether there was additional payment in form of default interest or increased interest - Contracts Act 1950, s. 75*

This was an appeal by the appellant/2nd defendant against the order of the sessions court allowing the application by the respondent/plaintiff for summary judgment in respect of a claim against the appellant, in his capacity as a guarantor for the 1st defendant pursuant to a letter of guarantee, under O. 26A of the Subordinate Courts Rules 1980 ('the SCR'). The first paragraph of the letter of guarantee showed the following: (a) the consideration is the purchase by the 1st defendant on credit terms to the 'extent' of RM50,000 only; and (b) the 2nd defendant … hereby guarantees to pay all outstanding accounts by the 1st defendant in the event of … . The appellant contended that a construction of the first paragraph of the letter of guarantee proved that the guarantee was to the extent of the sum of RM50,000 only whereas the claim

by the respondent was in the amount of RM121,338.46. The appellant also averred that the respondent had failed to comply with r. 2 of O. 26A of the SCR, the main thrust of his submission being that since it is a mandatory rule, it followed that paras. 1 and 2 of form 75A of the SCR are mandatory requirements and any omission to expressly include paras. 1 and 2 renders the affidavit-in-support defective.

Held (dismissing the appeal):

[1] On the facts, the respondent had more than satisfied the second condition on the verification of the facts of the claim in the affidavit-in-support, and the omission of such general terms as in para. 2 or (2) in form 75A of the SCR was not critical and certainly not a breach of r. 2(1) of O. 26A of the SCR. Moreover, the appellant was estopped from raising the issue of non-compliance of r. 2(1) as it was not raised at all in the court below, and the debt stated in the statement of claim and in the affidavit-in-support was never disputed by the appellant at all material times. A perusal of the respondent's affidavit supporting the application for summary judgment showed that the facts that gave rise to the claim against the appellant had been amply and sufficiently set out. It was indeed clear that the deponent of the said affidavit had verified the facts from personal knowledge and from documents that had been identified and exhibited in the record of appeal, of which the appellant had never disputed. In the premises, the respondent had fully complied with the preliminary requirements under O. 26A r. 2 of the SCR. (pp 481 d-h, 482 a, d-h & 483 a)

[2] It could be seen that the credit terms "to the 'extent' of RM50,000" was in respect of the purchase by the 1st defendant which formed the consideration to the guarantee. On the other hand, the appellant guaranteed to pay "all outstanding accounts by the 1st defendant in the event of …". Indeed, the 1st defendant could purchase on credit terms for more than RM50,000 to which the guarantor/appellant was liable to pay all outstanding accounts in the event of default as it was not stated anywhere in para. 1 of the said letter of guarantee that the credit was limited to RM50,000 only or that the guarantee was limited to RM50,000. There was no breach of any fundamental condition in the letter of guarantee when the 1st defendant, according to the facts of the case, purchased goods to an outstanding account of RM121,338.46. In the premises, so long as the respondent had given a promise on credit terms to the extent of RM50,000 only, there was sufficient consideration for it to enforce the promise of the appellant to guarantee all outstanding sums. (p 483 d-e & 484 f)

[3] As far as the letter of guarantee was concerned, there was no additional payment in the form of default interest or increased interest over and above the prescribed interest rate of 1.5% per month, which was the prevailing interest during the contract. Therefore, s. 75 of the Contracts Act 1950 was not applicable to the prevailing interest rate of 1.5% per month that had been agreed upon by the parties. (p 489 d)

[4] On the facts, the filing of the O. 26A application about one month after the summons and a subsequent similar application clearly showed that the respondent had no intention of going to a full trial and therefore ought not to suffer costs in the event of delay, if any. (p 492 a)

[5] The appellant had not raised triable issues in his defence or affidavits; consequently, the order of the sessions court ought to be upheld by this court. (p 492 b)

Case(s) referred to:

Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 SC ***(refd)***

Brinks Ltd v. Abu Saleh (No 1) [1995] 4 All ER 65 ***(refd)***

Ching Lai Huat v. UOL Credit Sdn Bhd [2002] 5 CLJ 449 HC ***(foll)***

Eushun Properties Sdn Bhd v. MBf Finance [1992] 3 CLJ 1519; [1992] 1 CLJ (Rep) 104 SC ***(dist)***

Harrison v. Botenheim [1878] WR 362 ***(refd)***

Kurban Ali Shah Syed Ahmad Ali Shah v. Pacific Orient Insurance Co Sdn Bhd [2001] 7 CLJ 284 HC ***(refd)***

Malayan Banking Bhd v. Chong Hin Trading Co Sdn Bhd [2001] 6 CLJ 263 HC ***(refd)***

Matrix Momentum Sdn Bhd v. Sarotoga Sdn Bhd [2002] 6 CLJ 162 HC ***(refd)***

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank Bhd [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187 SC ***(foll)***

Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York [1998] 1 CLJ 424 CA ***(refd)***

Re Young Manufacturing Co [1980] 2 Ch 753 ***(refd)***

Realvest Properties Sdn Bhd v. The Co-operative Central Bank Ltd [1996] 3 CLJ 823 FC ***(refd)***

Sime Bank Bhd v. Wu Chin Leng [2000] 4 CLJ 857 FC ***(refd)***

Sogelease Advance (Malaysia) Sdn Bhd v. Jantsco Sdn Bhd [2001] 5 CLJ 536 HC ***(refd)***

Tan Swee Hoe Corporation v. Ali Hussain Bros [1980] 2 MLJ 16 ***(dist)***

Teck Guan Trading Sdn Bhd v. Hydroteck Engineering (S) Sdn Bhd [1996] 1 BLJ 163 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 75, 89, 95, 97
Evidence Act 1950, ss. 91, 92
Subordinates Courts Rules 1980, O. 14 r. 18(1)(a), O. 26A rr. 2(1), 4(2), Form 75A

Other source(s) referred to:
Ian S Goldrein & KHP Wilkinson, *Commercial Litigation: Pre-emptive Remedies*, 1991, 2nd edn, p 350, para 5
KS Dass & Abdul Hamid, *Subordinate Court Practice 1981*, p 417, para 4
The Supreme Court Practice 1991, vol 1, part 1, p 145 para 14/2/5, p 148, para 14/3-14/4, p 308, para 18/12/23

For the defendant/appellant - TH Lee; M/s Cheah Teh & Su
For the plaintiff/respondent - S Shanmugam; M/s Peter Yip & Yong

Reported by Suresh Nathan

JUDGMENT

Faiza Tamby Chik J:
The preliminary requirements in respect of an application for summary judgment under O. 26A of the Subordinates Courts Rules 1980 (SCR 1980) is the manner in which the application is made under r. 2. The main thrust of the appellant's submission in respect of r. 2 is that being a mandatory rule it follows that paras. 1 and 2 of Form 75A SCR 1980 are mandatory requirements and any omission to expressly include paras. 1 and 2 renders the affidavit-in-support defective. Indeed the appellant has even submitted, quite erroneously, that it is mandatory for the respondent to expressly state paras. 1 and 2 of Form 75A SCR 1980 to entitle it to obtain summary judgment. I think that a plain reading of r. 2 shows clearly that what is mandatory of the affidavit-in-support is:

> (a) verifying the facts on which the claim … is based; and
>
> (b) stating that in the deponent's belief there is no defence to that claim …

The three basic conditions which the affidavit-in-support should satisfy as stated in the Subordinate Court Practice 1981 by K.S. Dass and Abdul Hamid (at p. 417 para 4) are as follows:

(i) it must be sworn by the plaintiff or by a person authorised by him;

(ii) the facts on which the claim or the part of a claim, to which the application relates is based must be verified, and

(iii) stating that in the deponent's belief that there is no defence to that claim or part, as the case may be or no defence except as to the amount of damages claimed.

Form 75A in Schedule A, SCR 1980 is brief with 4 paragraphs only for the simple reason that it refers to "particulars of claim that appears by the indorsement on the summons in this action" and therefore a statement in the affidavit in terms of para 2 or (2) of Form 75A is sufficient in general terms. The affidavit-in-support of the respondent:

(a) refers to the statement of claim dated 1 September 1995 (para 3);

(b) contains 11 paragraphs on the material facts of the claim together with the relevant exhibits to verify the facts adduced in the said affidavit;

(c) the letter of demand in exh. 'CLS4' in the affidavit-in-support verifies the exact amount that is due and owing by the second defendant which was never in dispute and to which the court below was not left in any doubt.

In the premises I am of the opinion that the respondent has more than satisfied the second condition on verification of facts of claim in the affidavit-in-support. *The Supreme Court Practice* 1991, vol. 1, Part 1, at p. 145 para 14/2/5 on verifying the facts it is stated "The verification may be by reference to the facts stated in the statement of claim, thus … 'the defendants are justly and truly indebted to the plaintiff in the sum of … action'." Further, in the authoritative text *Commercial Litigation: Pre-emptive Remedies, Second Ed.* By Ian S. Goldrein and K.H.P. Wilkinson, 1991 at p. 350 para. 5 states, "One of the functions of the plaintiff's affidavit is to verify the cause of the action. Such verification may be made in general terms by reference to the statement of claims" and in p. 351 para. 10 the two specimen forms of supporting affidavits are given in Form B (p. 532) and Form S (p. 540). I think the affidavit-in support (Lampiran 16a) is similar to Form S. Where the affidavit-in-support in Form 75A makes reference to verification of facts as in statement of claim then it is necessary to state the general terms in para 2, "that the defendant is justly and truly indebted to the plaintiff in the sum of …" However, where the affidavit-in-support in Form 75A expressly verifies by stating all the material facts of the claim together with all the relevant exhibits, the omission of such general terms as in para 2 or (2) in Form 75A is not critical and certainly not a breach of r. 2(1) of O. 26A SCR 1980. Moreover, the appellant is estopped from raising non-compliance of r. 2(1) as it did not

raise at all this issue in the court below and the debt stated in the statement of claim and in the affidavit-in-support was never disputed by the appellant at all material times.

In *Ching Lai Huat v. UOL Credit Sdn. Bhd.* [2002] 5 CLJ 449, I stated at p. 453 para d-e that, "… I think most importantly and which must be adhered to is that the affidavit-in-support to an application for summary judgement must state 'in the deponent's belief there is no defence to that claim'."

In *Matrix Momentum Sdn. Bhd. v. Sarotoga Sdn. Bhd.* [2002] 6 CLJ 162, the Court held at p. 165 paras d-f as follows, "… A straight reading of r. 2(1) will clearly show that what is required in an affidavit supporting an O. 14 application is a verification by the deponent of facts on which the appellant's claim and application is based and by reason of that the deponent believes that the defendant had no defence. It is to be noted that nowhere in the rule requires that the source of the deponent's belief should be his personal knowledge. The deponent's belief can also derive from records or documents that are in his custody or also from advice of solicitors who have access to such records and documents." A perusal of the plaintiff's affidavit that supported the application for summary judgment, showed that the facts that gave rise to the claim against the defendant had been amply and sufficiently set out. There was no flaw that was serious enough to override the plaintiff's right to be heard on this claim.

A perusal of the plaintiff's affidavit-in-support dated 12 January 2001 shows that:

(a) in para 11 (p. 49 of RA) the deponent has stated that in his belief there is no defence to the plaintiff's claim;

(b) in paras 4 to 10 (p. 45-49 RA) the deponent has verified the facts on which the claim is based;

(c) in para. 7 the deponent has stated that only RM70,400.07 was paid and the first defendant had not paid the balance outstanding which amount to RM121,338.46 as stated in para 8 and further in para 9 has stated categorically that till to date the defendant has failed to pay any or at all the sum claimed by the plaintiff.

It is indeed clear from para. 2 of the said affidavit that the deponent had verified the facts from personal knowledge and from documents which have been identified and exhibited from pp. 63 to 181 in the Record of Appeal to which the appellant has never disputed. In the premises it is my conclusion

that the plaintiff has fully complied with the preliminary requirements under O. 26A r. 2 SCR 1980. Having complied with the preliminary requirements, the burden of raising triable issues rests clearly on the appellant.

The construction of the first paragraph of the letter of guarantee (exh. 'CLS3', affidavit-in-support) by the appellant is entirely misleading when it is stated that the guarantee of the second defendant is to the extent of sum of RM50,000 only. A simple construction of para. 1 shows the following:

(a) the consideration is the purchase by the first defendant on credit terms to the 'extent' of RM50,000 only;

(b) the second defendant … hereby guarantee to pay all outstanding account by first defendant in the event of …

It can be seen that the credit terms to the "extent of RM50,000 was in respect of the purchase by the first defendant which forms the consideration to the guarantee. On the other hand the second defendant guarantees to pay all outstanding account by the first defendant in the event of …". Indeed the first defendant can purchase on credit terms for more than RM50,000 to which the guarantor/second defendant is liable to pay all outstanding account in the event of default for the reason that no where in para.1 of the said letter of guarantee is it expressly stated the credit is limited to RM50,000 only nor that the guarantee is limited to RM50,000. I think there was no breach of any fundamental condition in the letter of guarantee when according to the facts of the case the first defendant purchased goods to an outstanding account of RM121,338.46. In *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Berhad* [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187 Lee Hun Hoe (CJ SS) stated as follows:

> The first thing to do is to look at the letter of guarantee. The liability of the guarantor depends very much on the language of that instrument and the nature of the liability it creates. A guarantor is therefore entitled to insist on a rigid adherence to the terms of his obligation by the creditor and cannot be made liable for more than he has undertaken. The document in question, that is, the letter of guarantee like every other guarantee must be construed according to the intention of the parties as expressed by the language they have employed, understanding it fairly in the sense in which it is used. This intention is best ascertained by looking to the relative position of the parties at the time the letter of guarantee is written.

I think the intention of the parties on liability of the guarantor is plainly and simply expressed by the language employed in para. 1 of the letter of guarantee which is fairly understood by looking to the relative position of the parties which is that of a creditor and a guarantor. It is very clear that the appellant is construing the first paragraph that runs foul of the language employed in para. 1 of the letter of guarantee because:

(a) a condition precedent is construed when a consideration is stated;

(b) the purchase on credit terms to 'extent' of RM50,000 is only construed to mean maximum credit limit of RM50,000 only;

(c) the sum of RM50,000 only is construed to mean principal amount only when no such words were even employed.

It is observed that the appellant contradicted himself when on one hand he stated that all he was willing to do and did guarantee under the guarantee was no more than RM50,000 (para 14 appellant's submission) but later admitted liability to sums exceeding RM50,000 (para 17(a)(iv) appellant's submission-in-reply). I think the language employed in the letter of guarantee is plain and simple and there is no room for ambiguity to attract the *contra proferentum* rule. The submission of the appellant in respect of want of consideration in first paragraph of the letter of guarantee is misconceived as the correct section governing consideration for guarantee is s. 89 of the Contracts 1950 states, "Anything done, or any promise made, for the benefit of the principal debtor may be sufficient consideration to the surety for giving the guarantee." In the premises, it is my conclusion that so long as the respondent has given a promise on credit terms to the extent of RM50,000 only there is sufficient consideration for it to enforce the promise of the appellant to guarantee all outstanding sums. In any event in para. 3 of the letter of guarantee (p. 177 of RA) the appellant has expressly agreed that:

> … Our liability under this guarantee shall not in any way be discharged, diminished or effected by invalidity or unenforceability of:
>
> (a) the letter of quotation accepted by the above purchaser;
>
> (b) by the variation of any terms given to the purchaser (print unclear).

Hence it is evident that by virtue of para. 3 of sub-para (b) of the letter of guarantee the liability of the appellant under this guarantee shall not in any way be discharged or diminished in the event of the respondent varying the credit terms exceeding RM50,000 only.

The appellant has stated that there were 2 purported representations and warranties as follows:

(a) Plaintiff represented that he was duly prepared to give credit to the first defendant up to a maximum sum of RM50,000 (see para 4(b) of the statement of defence and para 7.1 of affidavit-in-opposition);

(b) Plaintiff represented that it would require a guarantee from all the directors of the first defendant as well as from the parent company of the 1st defendant, ie, Uniphoenix Corporation Berhad before the plaintiff agree to supply any goods to the first defendant on credit (see para 4(a) of the statement of defence and para 7.4 of the affidavit-in-opposition).

It is noted that the appellant has failed to provide the particulars of representations in the statement of defence as well as in the affidavit-in-opposition. Indeed it is a mandatory requirement under O. 14 r. 18 SCR 1980 that every pleading must contain the necessary particulars of any claim, defence or other matter pleaded. It is pertinent to note that the plaintiff is a limited company and can conduct its business only through its principal officers. The second defendant in his statement of defence has failed to provide particulars by whom the two alleged representations were made and under what circumstances they were made. In addition, the affidavit-in-opposition of the second defendant does not condescend upon particulars in respect of the alleged representations. *The Supreme Court Practice* 1991, vol. 1, Part 1 at p. 148 para 14/3-14/3 on defendant's affidavit (in respect of summary judgment) states, "The defendant's affidavit must condescend upon particulars and should as far as possible, deal specifically with the plaintiff's claim and affidavit and state clearly and concisely what the defence is and what facts are relied on to support it …". Indeed, in all cases, sufficient facts and particulars must be given to show that there is a triable issue. More significantly, since the purported representations and warranties themselves were allegedly by the plaintiff's company, I am of the view that the appellant is relying on hearsay statements. It is patently clear that the second defendant in not disclosing the sources and grounds of information has breached O. 26A r. 4(2) SCR 1980. According to the *Supreme Court Practice* 1991 Vol. 1, Part 1 at p. 148 para 14/3-14/4 states, "Matter of hearsay is admissible in the defendant's affidavit (*Harrison v. Botenheim* [1878] WR 362 CA) provided that the sources and grounds of information or belief are disclosed, see r. 4(2) and *Re Young Manufacturing Co.* [1980] 2 Ch. 753 CA. Since the sources and grounds of the alleged representations and warranties are not at all disclosed in the second defendant's affidavit they are matters of hearsay which are not admissible at all.

The appellant's submission that breaches of the purported representations and warranties has resulted in misrepresentations thus invoking s. 95 of the Contracts Act 1950 is wholly misconceived. Nowhere in the statement of defence nor in the affidavit-in-opposition has the second defendant positively asserted misrepresentation on the part of the plaintiff much less provided any particulars of misrepresentation. *The Supreme Court Practice* 1991, Vol. 1, Part 1 at p. 308 para 18/12/23 on Misrepresentation states:

> Particulars of any misrepresentation must be contained in the pleading. The statement of claim must show the nature and extent of each alleged misrepresentation (*Newport etc., Co. v. Paynter* [1887] 34 Ch. D 88) by whom and to whom it was made and whether verbally or in writing – in the latter case identifying the document.

The appellant has pleaded in his statement of defence two misrepresentations, namely in respect of the credit limit of the guarantee to RM50,000 only and in respect of the understanding that all directors of the first defendant company and the parent company shall execute similar guarantees. These allegations are also mainly repeated in the appellant's affidavit-in-opposition. The main thrust of the appellant's submission is that there are sufficient material facts on misrepresentation to invalidate the guarantee by virtue of s. 95 of the Contracts Act 1950. I think the misrepresentation though alleged in the defence is without sufficient particulars as required under O. 14 r. 18(1)(a) SCR 1980. In addition, the affidavit-in-opposition merely repeats the misrepresentation alleged in the defence without condescending upon particulars. The point is the degree of sufficiency of particulars needed in the pleadings depends on the nature of the facts alleged and ought to be such that it will not put the other party to a surprise in the trial. The allegations of misrepresentation in the defence and the evidence adduced in the affidavit have indeed raised several questions on material facts which, *inter alia*, by way of illustration the question is, "Who, on behalf of the plaintiff company made these representations?" Till to date this material fact to which the appellant claims personal knowledge has not been disclosed as evidence in any affidavit at all. Therefore, the appellant has failed to raise a triable issue on the purported misrepresentations, and consequently it appears wholly unjustified now for the appellant to be given an opportunity to call for *vica voce* evidence to prove these misrepresentations. Further since the appellant has failed to plead misrepresentation with sufficient degree of particularity it cannot now shift the burden on the respondent to make applications for further particulars as required under O. 14 r. 18 SCR 1980. A careful perusal of the first purported representation clearly shows that the plaintiff was duly prepared to give credit to the first defendant to a

maximum sum of RM50,000. This purported representation does not state that the plaintiff has limited the maximum credit sum to RM50,000 only. There is not an iota of evidence adduced by the second defendant on the purported representation that credit given to the first defendant is limited to RM50,000 only nor is there any explanation given why the second defendant failed to inquire from the plaintiff that the letter of guarantee does not expressly state the said maximum credit is limited to RM50,000. In any event, the second defendant could have limited his guarantee to RM50,000 but it is clear that he agreed to guarantee all outstanding to account of the first defendant as expressed in para. 1 of the said letter of guarantee. A careful perusal of the second purported representation in paras 7.3, 7.4 in the affidavit-in-opposition and para 4(a), 4(d), 4(e) of the statement of defence clearly indicates:

(a) the plaintiff would require a guarantee from all the directors;

(b) the plaintiff would arrange for separate guarantees to be executed by the directors as the available space in a Standard Form was insufficient;

(c) the second defendant believed the representations and proceeded to sign the guarantee form.

I think it is improper and baseless for the second defendant to state that he signed the guarantee on the representation that other directors shall execute the guarantee. The Federal Court case in *Sime Bank Bhd. v. Wu Chin Leng* [2000] 4 CLJ 857 at p. 866 stated, "In our view, the condition precedent is predicated on a contract made between the person who gives the guarantee and the creditor and in the context of s. 97 of the Contracts Act 1950, the contract means an understanding between the person who gives guarantee, ie, the guarantor or surety and the creditor that the guarantee is only valid if all the guarantors sign." In the premises, at the most there had been only a unilateral understanding by the second defendant that his guarantee is valid and binding provided all others executed their guarantees. However, nowhere is there any representation and warranty by the plaintiff/creditor that the guarantee of the second defendant is only valid and binding if all the other directors executed their guarantees. Consequently since there is no contract that the plaintiff (creditor) shall not act upon the guarantee until other persons have joined in it as co-sureties then the guarantee remains valid and binding even though other persons do not join as guarantors and hence s. 97 of Contracts Act 1950 is inapplicable. The case of *Tan Swee Hoe Corporation v. Ali Hussain Bros.* [1980] 2 MLJ 16, a leading authority on collateral contracts and warranties is not applicable to the facts of the present case since:

(i) it refers to a tenancy agreement;

(ii) the collateral contract (oral agreement) was upheld as it was supported by a tea-money consideration independently of the main written tenancy agreement upon applying the common-law test propounded by Lord Moulton in *Heilbut Symons & Co. v. Buckleton.*

The purported second representation is governed by express statutory provision in s. 97 of Contracts Act 1950 which relates to guarantee and contract and the second defendant has failed to invoke s. 97 of Contracts Act 1950 to invalidate the guarantee. In addition the Supreme Court case of *Eushun Properties Sdn. Bhd. v. MBF Finance* [1992] 3 CLJ 1519; [1992] 1 CLJ (Rep) 104 is not applicable as there were documentary evidence between the parties which supported a separate oral agreement pursuant to proviso (b) of s. 92 of the Evidence Act 1950. However, no documentary evidence has been adduced in the facts of the present case to support a collateral contract. In any event the court ought to reject any extrinsic evidence of negotiations or understanding as the effect of admitting extrinsic evidence of the 'understanding' would be to vary or to contradict the terms of the guarantee and this would fall foul of the provisions of ss. 91 and 92 of Evidence Act 1950.

In para. 2 of the letter of guarantee it is stated, "It is also agreed that credit terms shall be for the period of 30 days and that all interest charges of 1.5% per month on all overdue accounts owed will also be borne by me/us." The interest rate of 1.5% per month is one expressly agreed between the parties and it is now too late for the second defendant to complain that it amounts to 18% per annum which is excessive and exorbitant. In a similar case of *Sogelease Advance (Malaysia) Sdn. Bhd. v. Jantsco Sdn. Bhd.* [2001] 5 CLJ 536, an agreed fix rate of 0.05% per day (approximately 1.5% per month or 18.25% per year) for late charges was held not to be excessive in nature and therefore not caught by s. 75 of Contracts Act 1950. It is pertinent to note that a perusal of illustration (d) to s. 75 of Contracts Act 1950 clearly shows an interest of 12% at the end of six months (ie, 2% per month) is not considered a penalty but a default interest of 75% payable from the date of default is a stipulation by way of penalty. In this connection, it is relevant to note that the interest stated in the letter of guarantee is not described as a default interest nor a penalty interest or an increased rate of interest incurred upon a breach of contract. On the contrary, the rate of interest of 1.5% per month after 30 days credit is an 'on-going' or prevailing interest agreed upon the parties even before any breach of contract has occurred. In the premises since the interest according to the terms of the letter of guarantee is incurred even before breach, I think such an interest does not violate s. 75 of the

Contracts Act 1950 and is entirely lawful for the respondent to claim the such prevailing interest. In comparison, in the Federal Court case of *Realvest Properties Sdn. Bhd. v. The Co-operative Central Bank Ltd. (under receivership)* [1996] 3 CLJ 823 at page 834, it was held that where the default interest was paid side by side with the interest calculated at prescribed rate of interest on the same money lent or owed for the same span of time, it is in other words, a second additional payment of interest on the same money lent or owed and it became payable in addition to the normal payment of interest on the same money lent or owed whereby such interest is void and unenforceable by virtue of s. 75 of the Contracts Act 1950. The case was again applied in *Malayan Banking Bhd. v. Chong Hin Trading Co. Sdn. Bhd.* [2001] 6 CLJ 263 where at p. 269, it was held, "In all circumstances the evidence is clear that the default interest is a separate payment in addition to the interest rate otherwise prevailing upon the loan at the time of default. … since the payment is a penalty, s. 75 remains applicable to render the default interest provision unenforceable". I am of the view that as far as the letter of guarantee is concerned there is no additional payment in the form of default interest or increased interest over and above the prescribed interest rate of 1.5% per month which is prevailing during the contract. Therefore s. 75 of the Contracts Act 1950 is not applicable to the prevailing interest rate of 1.5% per month which was agreed upon by the parties.

I am of the opinion that the guarantee of the second defendant is not an on-demand guarantee. The Supreme Court in *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kowng Yik Bank Berhad* [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187 RHS para I held, "The first thing to do is to look at the letter of guarantee. The liability of the guarantor depends very much on the language of that instrument and the nature on the liability it creates. A guarantor is therefore entitled to insist on a rigid adherence to the terms of his obligation by the creditor and cannot be made liable for more than he has undertaken".

Paragraph 1 of the letter of guarantee contains the liability clause. It is very clear that there are no operative words such as, "… on-demand shall pay …". In the premises I think that a demand on the guarantee is not a condition precedent to liability of the guarantor (see *Kurban Ali Shah bin Syed Ahmad Ali Shah v. Pacific Orient Insurance Co. Sdn. Bhd.* [2001] 7 CLJ 284). In the event that a demand is held to be a condition precedent to liability, it is observed that a proper demand had been served on the second defendant in strict compliance with the service clause as contained in para. 6 of the letter of guarantee. The said service clause stipulates:

(a) any notice or demand made by you may be served on us personally or sent to us by registered post to our address stated herein;

(b) it shall be conclusively deemed to have been received by us in seventy-two (72) hours after the time of posting despite any evidence to the contrary.

Exhibit 'CLS4' in affidavit-in-support clearly proves that a letter of demand dated 22 August 1994 was sent to the second defendant by registered post to the address at No. 2, Iris Garden, 93200 Kuching which is the address stated in the letter of guarantee. Consequently, the deeming provision in the service clause of the letter of guarantee stipulates that the demand shall be deemed to have been received by the second defendant despite any evidence to the contrary. (See *Teck Guan Trading Sdn. Bhd. v. Hydroteck Engineering (S) Sdn. Bhd.* [1996] 1 BLJ 163 at 171 paras G-H-I and 172 para A-B). Therefore it is now too late for the second defendant to insist that he was in a different address and did not receive the demand. Indeed in the light of the deeming provision, whether the second defendant did not actually receive the demand which the Plaintiff had sent to him pursuant to the service clause is immaterial and can afford no defence to the action (see *Amanah Merchant Bank Bhd. v. Lim Tow Choon* [1994] 2 CLJ 1.

The brief chronology of the case is as follows:

1 September 1995	Summon filed in Georgetown;
5 October 1995	Notice of Appearance of both defendants;
31 October 1995	First O. 26A application against D2 filed in Georgetown (Lampiran 4);
31 October 1995	Notice of application of defendant to transfer suit to Kuala Lumpur;
15 January 1996	Order to transfer;
29 March 2000	Statement of Defence filed;
18 September 2000	Order to strike off the first O. 26A application within cost and liberty to file afresh (based on preliminary objection);

23 January 2001	Second O. 26A application against D2 filed in Kuala Lumpur Sessions Court;
22 January 2002	Order for summary judgment against second defendant.

From the above chronology, it is clear that as early as 5 October 1995 about one month after filing the summons the plaintiff had filed its application for summary judgment. However, upon a transfer of the proceedings to Kuala Lumpur the said application was struck off on 18 September 2000 with cost and liberty to file afresh. Hence the second application for O. 26A was filed on 23 January 2001, some four months after the order for liberty was given. The plaintiff in para 10 of the affidavit balasan has given reasons for this delay including the need for original documents to be verified by the newly appointed solicitors. In the case of *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co. Ltd.* cited in p. 426 of the *Subordinate Court Practice* 1981 by K.S. Dass and Abdul Hamid, it was held that the delay of a lapse of three months in the circumstances of the case is not inordinate and does not warrant a dismissal of the application. Any inordinate delay in application for summary judgment is not critical where the court holds there are no triable issues. Indeed in the All England Annual Review 1995 at p. 404 on summary judgment, it was stated thus, "Delay is not impediment to an application for summary judgment, it was held in *Brinks Ltd. v. Abu Saleh (No. 1)* [1995] 4 All ER 65. If there is no arguable defence, Jacob J explained, the fact of delay is quite irrelevant to the question of whether summary judgment should be given because, where the defendant has no defence it is both pointless and wasteful for him to insist on full trial, no matter how long the plaintiff has delayed in bringing the application for summary judgment. Of course, if the plaintiff had previously indicated an intention to go to full trial and has encouraged the defendant to incur cost in preparation for such trial he would have to settle the penalty of costs for delaying his application. But he remains entitled to summary judgment provided he fulfill the conditions that are required for obtaining summary judgment." This is further supported in the Court of Appeal case of *Perkapalan Shamelin Jaya Sdn. Bhd. & Anor v. Alpine Bulk Transport New York* [1998] 1 CLJ 424, where it was held an application for summary judgment cannot be defeated solely on the ground that there has been a delay in making such an application; delay cannot provide an answer to such an application where there are no *bona fide* triable issues or where there is no real defence disclosed. A short reference to the chronology of

events above mentioned shows that the filing of an O. 26A application about one month after the summons and a subsequent similar application clearly shows the plaintiff had no intention of going to a full trial and therefore ought not to suffer cost in the event of delay, if any.

For these reasons the appellant has not raised triable issues in their defence or affidavit. Consequently the order of the Sessions Court Kuala Lumpur dated 22 January 2002 ought to be upheld by this court and I hereby do. In the premises, the appeal is dismissed with costs.